

EARL VIELLE
v.
AREA DIRECTOR, BILLINGS AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 86-28-A

Decided October 30, 1986

Appeal from a decision of the Acting Assistant Billings Area Director rejecting appellant's bid for the Swift Current Creek timber sale, Blackfeet Indian Reservation, Montana.

Affirmed in part; remanded in part.

1. Federal Employees and Officers: Conflict of Interest--Indians:
Timber Resources: Timber Sales Contracts: Generally

Appellant did not establish that the rejection of his bid on a timber sales contract involved a conflict of interest on the part of a Bureau of Indian Affairs employee, but the allegation warrants discussion in the decision on remand.

2. Indians: Timber Resources: Timber Sales Contracts: Generally

The regulations governing timber sales from tribal land authorize rejection of a high bid if the high bidder is considered unqualified to perform the contract or if there are reasonable grounds to consider it in the interest of the Indians to reject the high bid. 25 CFR 163.11(a).

3. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Timber Resources: Timber Sales Contracts: Generally

The determination of whether a high bidder is qualified to perform a timber sales contract or whether rejection of a high bid is in the interest of the Indians is a determination requiring the exercise of discretion.

4. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

Under 43 CFR 4.337(b), the Board of Indian Appeals must refer to the Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner of Indian Affairs those issues arising in an appeal before it that are committed to the Commissioner's discretion.

APPEARANCES: E. June Lord, Esq., and Patrick F. Flaherty, Esq., Great Falls, Montana, for appellant; J. McLane Layton, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Earl Vielle challenges a November 6, 1985, decision of the Acting Assistant Area Director, Billings Area Office, Bureau of Indian Affairs (appellee; BIA), rejecting his bid for the Swift Current Creek timber sale, Blackfeet Indian Reservation, Montana. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and remands the case to BIA.

Background

On October 17, 1985, bids were opened following advertisement of the Swift Current Creek timber sale by the Superintendent, Blackfeet Agency, BIA (Superintendent). 1/ The sale covered approximately 96 acres of timbered Blackfeet tribal land estimated to contain 1,747,038 board feet of sawlogs. The advertisement stated that no bid for less than \$1 per thousand board feet would be accepted. It also limited bidding to Blackfeet tribal members. 2/ Two bids were received by the Superintendent. Appellant bid \$10 per thousand board feet for a total of \$17,470. The other bidder, Galen LaPlante, bid \$1 per thousand board feet for a total of \$1,747.

On October 2, 1985, the Superintendent transmitted the bids to appellee who, by memorandum dated November 6, 1985, rejected appellant's bid. In explanation of the rejection, appellee's memorandum states at page 1:

The reasons for rejecting [appellant's] bid are that we do not consider him to be qualified to fulfill the Swiftcurrent Creek contractual obligations and that we do not believe an award to [appellant] would be in the best interest of the tribe. [3/]

1/ Timber sales from Indian lands are governed by 25 CFR Part 163.

2/ This limitation is permitted by 25 CFR 163.8(a).

3/ 25 CFR 163.11(a) provides in relevant part:

"The high bid received in accordance with any advertisement issued under authority of this part shall be accepted, except that the approving officer, having set forth the reason(s) in writing, shall have the right to reject the high bid if:

[Appellant's] past performance indicates that he is incapable of successfully completing timber sale contracts. ELP Enterprise defaulted the Milk River Ridge Timber Sale Contract in 1980 owing \$23,467.30 in damages for failing to perform required slash disposal and for failing to log all timber designated for harvest. In 1983, [appellant] defaulted the Triangle Logging Unit permit by failing to complete required timber harvest and perform required clean up work. Also in 1983, [appellant] bought a 1 acre post and pole unit and felled the trees but never removed the material from the unit. These actions cost the tribe money and were damaging to the resource and timber management efforts of the reservation. Presently, [appellant] does not own any logging equipment and does not have a contract to sell sawlogs at Plum Creek, Inc. Both his present situation and past performance lead us to believe that it is very unlikely that [appellant] could successfully operate the sale.

Appellant appealed this rejection to the Deputy Assistant Secretary--Indian Affairs (Operations) by letter dated November 20, 1985. On February 14, 1986, the Board received a motion from appellant requesting that it assume jurisdiction over his appeal pursuant to 25 CFR 2.19. ^{4/} By order dated February 21, 1986, the Board made a preliminary determination that it had jurisdiction over the matter. On May 30, 1986, the Board received a motion from appellee seeking to have the case dismissed for lack of jurisdiction on the grounds that the decision under review was discretionary. Appellee further sought to have the case remanded for issuance of a final decision. On July 18, 1986, the Board denied the motion to dismiss because it was unable at the time to determine whether the case involved solely an exercise of discretionary authority. Both appellant and appellee filed briefs.

Discussion and Conclusions

Appellant makes three arguments on appeal: (1) BIA did not follow the applicable laws and regulations in the bid process, (2) appellant is qualified

fn. 3 (continued)

"(1) The high bidder is considered unqualified to fulfill the contractual requirement of the advertisement, or

"(2) There are reasonable grounds to consider it in the interest of the Indians to reject the high bid."

^{4/} 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

to perform the contract, and (3) it is in the best interest of the tribe that appellant be awarded the contract.

Appellant identifies the laws and regulations relevant to this appeal as 25 U.S.C. §§ 476 and 477, 5/ 25 CFR 163.13(a), 6/ and a Forest Management Plan and Environmental Assessment which appellant states was prepared by the Blackfeet Agency. 7/

Appellant argues that BIA violated these laws and regulations and breached its duty as trustee by advertising the sale without the approval of the Blackfeet Tribe and by sending appellant's contract to the Billings Area Office without his signature or the tribe's approval. Appellant also argues that BIA violated Interior Department regulations by advertising the sale for a minimum of \$0.99 per thousand board feet, 8/ rather than \$15 per thousand board feet, the rate specified for sawlogs in Blackfeet Ordinance No. 40, enacted on December 12, 1974, which regulates timber cutting by permit on the Blackfeet Reservation.

Appellant further asserts that a BIA employee told him that no action could be taken on the Swift Current Creek sale until appellant signed a document concerning a corporation, ELP Enterprises, which he had formerly operated. Appellant states, "It appears that BIA has made an attempt, through what could be construed as blackmail, to obtain a waiver of legal

5/ All citations to the United States Code are to the 1982 edition.

25 U.S.C. § 476 provides that a constitution adopted by a tribe organized under the Indian Reorganization Act, 25 U.S.C. §§ 461-479, shall vest in the tribe or its tribal council, the power, inter alia, "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 477 provides that a charter issued to a tribe incorporated under the Indian Reorganization Act may convey to the incorporated tribe certain management and disposition authority over tribal property.

6/ 25 CFR 163.13(a) provides:

"All contracts for the sale of tribal timber shall be executed by the authorized tribal representative(s). Contracts must be approved by the Secretary to be valid. There shall be included with the contract, an affidavit executed by the appropriate tribal representative(s) setting forth the resolution or other authority of the governing body of the tribe authorizing the sale."

7/ This document is not in the record. At page 5 of his brief, appellant quotes section 7(a) of the document: "Tribal involvement during all stages of timber sale preparation will allow their concerns regarding employment, environmental quality, resource commitment and sale location ... to be properly addressed. Separate tribal resolutions approving sale advertisement and subsequent award and contract ... must be secured." (Emphasis supplied by appellant.)

8/ The advertisement actually specifies a minimum bid of \$1 per thousand board feet.

right arising from past contracts by withholding a contractual opportunity" (Appellant's Brief at 4).

In response to appellant's statement that BIA advertised the sale without the tribe's consent, appellee submits a letter dated July 15, 1985 (Exh. A to Appellee's Brief), in which the tribe rejected all bids from an earlier advertisement of this timber unit and requested BIA to readvertise the sale.

Appellee also states that no contract was sent to the Billings Area Office. Instead, following normal procedures, an abstract of the bids was sent to the Area Office for review and selection of the person to whom a contract would be awarded. Since appellant's bid was rejected, no contract for appellant was ever prepared. If appellant's bid had been accepted, the tribe's approval would have been evidenced by its execution of a contract.

In response to appellant's argument that BIA was required to advertise the sale for a minimum of \$15 per thousand board feet, in conformity with the tribe's permit ordinance, appellee states that appellant has confused timber sales and timber permits. Appellee argues that timber sales and permits are governed by different regulations, that timber sales are intended for large volumes of timber and timber permits for small volumes, and that the prices for timber sales are set by appraisal whereas the tribe sets the price for permits.

Finally, appellee states that although appellant was asked to sign a certificate of completion for an earlier contract while the determination was being made on the present sale, no threat to withhold action on the Swift Current Creek sale was made.

Based on the presentations made, the Board concludes that appellant has not stated a violation of law or regulation by BIA in the advertising and bid process. Appellant's allegation that the tribe did not consent to the advertisement is refuted by the tribe's letter requesting the advertisement. The tribe's approval of a contract could not occur until a bid had been accepted by BIA and a contract prepared for execution by the tribe.

Appellant has not identified any regulation which requires BIA to advertise timber sales at prices set by the tribe for timber permits. Blackfeet Ordinance No. 40, cited by appellant, is clearly applicable to timber cutting permits rather than timber sales. Section 2 of the ordinance, entitled "Minimum prices for minor timber products; permits therefor," provides:

Any forest product, as described below, contained within the exterior boundaries of the Blackfeet Reservation, and taken for commercial purposes shall pay the following rates, after a permit is applied for and issued by the Forestry Department of the Bureau of Indian Affairs, Blackfeet Agency, Browning, Montana: (1) Sawlogs - \$15.00 per M board feet * * *.

Apparently, disposition of this timber could have been accomplished by permit, pursuant to 25 CFR 163.19, rather than by competitive sale. ^{9/} The record does not reflect why it was determined to dispose of the timber by sale rather than by permit and appellant does not challenge that determination. The Board notes that appellant's bid of \$10 per thousand board feet would not have met the tribe's minimum price for sawlogs cut under permit.

With respect to appellant's allegation that a BIA employee threatened to withhold action on the sale unless appellant signed a certificate of completion for an earlier contract, a factual discrepancy exists, inasmuch as appellee denies that such a threat was made. Appellant does not say whether or not he signed the document, which he apparently had an obligation to complete by reason of his earlier contract. Clearly, however, whether or not the threat was made, BIA did act on the sale, to the extent, at least, of declining appellant's bid. Appellant has not alleged that any threat was made to decline his bid if he failed to sign the document. The Board finds that, even if the threat alleged by appellant was made, appellant has not established that any of his legal rights were violated.

For the reasons discussed, the Board holds that BIA did not violate any of the laws or regulations identified by appellant in the advertisement and bid process for the Swift Current Creek timber sale.

[1] Appellant makes one other allegation which he does not describe as a violation of law or regulation but which raises the question of such a violation. Appellant asserts that his bid was rejected in favor of LaPlante's lower bid because LaPlante was a former BIA employee and was related to Ted Hall, a BIA employee whom appellant describes both as the "Contracting Awarding Supervisor" and the "Resource Manager" at the Blackfeet Agency, and a cousin of LaPlante. A December 20, 1985, memorandum of the Area Director acknowledges that LaPlante was a BIA employee until July 1985. Nothing in appellee's submissions identifies the position of Hall in BIA, his relation to LaPlante, or his role, if any, in the decision to decline appellant's bid.

Federal law and Departmental regulations impose certain post-employment restrictions on former Federal employees. 18 U.S.C. § 207; 43 CFR Part 20, Subpart G. These restrictions relate to representation of others, however, rather than to contacts made by a former employee on his own behalf. Federal law also prohibits a Federal employee from participating in his governmental capacity in any matter in which he, his spouse, or minor child has a financial interest. 18 U.S.C. § 208; 43 CFR 20-735-22(a)(3). Departmental regulations further provide: "No employee shall * * * [h]ave a direct or

^{9/} 25 CFR 163.12 provides that contracts are required where the appraised stumpage value exceeds \$10,000. 25 CFR 163.19, Timber cutting permits, governs cutting that is not done under formal contract. Subsection 163.19(c) provides in relevant part: "Unless otherwise authorized by the Secretary, the stumpage value which may be cut under paid permits in a fiscal year by any individual under this authority shall not exceed \$10,000."

indirect financial interest that conflicts substantially, or appears to conflict substantially, with his or her Government duties and responsibilities.” 43 CFR 20.735-21(c)(1). ^{1/} From the facts alleged by appellant, it does not appear that either LaPlante or Hall was in violation of these provisions. Therefore, the Board holds that appellant's allegations concerning conflict of interest do not establish a violation of law or regulation. Even though the Board so holds, however, it believes that the circumstances of LaPlante and Hall warrant discussion in the decision to be rendered following the partial remand of this appeal discussed below, so that, at the least, a complete record on this point can be established. Therefore, the Board requests that BIA address appellant's conflict of interest allegation in its decision on remand.

[2, 3, 4] Appellant's remaining allegations concern his qualifications to perform the contract and whether the rejection of his bid is in the best interest of the tribe. 25 CFR 163.11(a) authorizes the approving officer to reject a high bid, after setting forth the reason(s) in writing, if the bidder is considered unqualified or if there are reasonable grounds to consider it in the interest of the Indians to reject the high bid. See note 3, supra. Appellee's November 6, 1985, memorandum, quoted supra, gave reasons for its conclusions that appellant was unqualified and that an award to him would not be in the best interest of the tribe. Appellee's decision clearly conformed with the requirements of the regulation. The determinations of whether appellant is qualified to perform the contract and whether the rejection of appellant's bid is in the best interest of the tribe are determinations requiring the exercise of discretion. Cf. Quinault Allottees Association v. Portland Area Director, 14 IBIA 149 (1986); Simons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243 (1986). 43 CFR 4.337(b) provides that "[w]here the Board finds that one or more issues involved in an appeal or a matter referred to it require the exercise of discretionary authority of the Commissioner, the Board shall refer those issues to the Commissioner for resolution." Appellee requests that the case be remanded and states that a decision will be issued promptly upon remand. The Board finds that the issues of whether appellant is qualified to perform the contract and whether rejection of his bid is in the best interest of the tribe should be remanded to BIA for the exercise of the discretionary authority of the Secretary.

^{10/} 43 CFR 20.735-21(b) provides in relevant part:

“(2) ‘Apparent conflict’ means a situation where a member of the public would have reasonable cause to believe that an employee may be in conflict, even though he or she might not be. It is not necessary for an employee to have actually taken a Government action related to private financial interests for there to be an apparent conflict.

* * * * *

“(4) ‘Indirect interest’ means any ownership or part ownership of a financial interest by an employee in the name of another where the employee still reaps the benefits. Indirect interest includes:

* * * * *

“(iii) Substantial holdings of a spouse or dependent child.”

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 6, 1985, decision of the Acting Assistant Billings Area Director is affirmed with respect to its conformity to law and regulation and remanded to the Bureau of Indian Affairs for review of the remaining issues in the appeal.

Anita Vogt
Acting Chief Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge